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* ADMITTED TO BAR KENTUCKY
AND INDIANA
* ADMITTED TO BAR KENTUCKY
AND OHIO
* ADMITTED TO BAR NEW YORK
AND CONNECTICUT ONLY
* ADMITTED TO BAR NORTH
CAROLINA ONLY

July 1, 1995

Mr. James R. MacAyeal
Mr. James D.P. Farrell
Environmental Enforcement Section
United States Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, DC 20044-7611

Re: United States of America v. Ben Hardy, et al.

Dear Jim and Jamie:

I enclose a copy of our comments on the latest version of the Consent Decree which you have provided to us. These comments reflect the discussions in our previous telephone conversation. We will still need to provide you with some additional information regarding the properties, as well as a time table for liquidation.

As I mentioned to Jim, I will be out of the office until July 17. At that time, we would anticipate finalizing the financial disclosure information, as well as the terms of the Consent Decree.

Sincerely,

Mark R. Feather / tk
Mark R. Feather

Enclosure

50:tlk:064
HXA.D5412
064:D5412:macayeal.06



10875959

JUL 1 1995

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA)

Plaintiff,)

v.)

BEN HARDY, et al.,)

Defendants.)

Civil Action Nos. 90-0695-L(J)

90-0792-L(J)

CONSENT DECREE

WHEREAS, Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed a Complaint in United States District Court for the Western District of Kentucky on October 18, 1990, pursuant to Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9607 and 9613(g), for declaratory relief and reimbursement of costs incurred and to be incurred by the United States in response to releases and threatened releases of hazardous substances into the environment from the Lee's Lane Landfill Superfund Site located approximately 4.4 miles southwest of Louisville, Kentucky, adjacent to the ~~southern~~ eastern bank of the Ohio River (the "Site");

WHEREAS, the United States has incurred costs in performing response actions at the Site, not including certain attorney's fees and prejudgment interest, of \$4,017,165.43 and the interest on the outstanding balance of \$1,361,580.76, for a total of \$5,378,746.19, as of September, 1994 ("Past Costs");

WHEREAS, the United States has incurred and will have incurred additional costs, including but not limited to attorney's fees and

prejudgment interest, up to the date of entry of this Consent Decree; and will incur costs in connection with this Consent Decree until termination of this Consent Decree (collectively, "Future Costs");

*free-
legal costs
only*

WHEREAS, the United States has already entered into settlements with other parties in connection with the Site and pursuant to the settlements, embodied in two consent decrees, the other parties have reimbursed the United States a total of \$3,101,230.00 ~~of the \$5,378,746.19 in outstanding costs~~ for Past Costs incurred by the United States;

*not free
if over 50
was for party's
future costs*

WHEREAS, pursuant to an Administrative Order on Consent, the Jefferson County Metropolitan Authority has provided \$500,000 in maintenance and oversight costs for the Site;

*↓
consent
not to
pay*

WHEREAS, the United States has sought to recover Past Costs of ~~at least~~ \$2,277,516.19 and obtain a declaratory judgment for Future Costs from the remaining nonsettling defendants: Ben B. Hardy, Jr., J H Realty, Inc. and The Hofgesang Foundation, Inc. ("Foundation") (hereinafter collectively "Defendants");

WHEREAS, the United States and Defendants agree and this Court, by entering this Consent Decree, finds that settlement of this matter will avoid prolonged and complicated litigation and that this Consent Decree, without being an admission of liability, is fair, reasonable, and in the public interest;

THEREFORE, with the consent of the parties to this Consent Decree, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

A. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9607 and 9613(b). This Court also has personal jurisdiction over Defendants. Solely for the purposes of this Consent Decree, Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District and shall not challenge the entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

II. REPRESENTATIONS AND WARRANTIES

B. Defendants represent and warrant to the best of their knowledge and belief as follows:

1. The Foundation⁴ has assets and property interests are as follows:

a. Real estate at 3000 Crittenden Drive, Louisville, Kentucky, which was appraised at \$585,000 on April 1993, and which has an outstanding mortgage of \$131,480.51 as of April 3, 1995;

b. An account receivable in the form of a note in the original amount of \$285,000 payable in sixty (60) monthly installments (forty (40) monthly payments of \$3,000.00 each remain on the note as of [date] and a balloon payment of \$208,037.81 is due at the end of forty months);

c. A note in the original amount of \$7,000.00, payable in forty (40) monthly installments, secured by a single

585,000

131,480

454,520

285,000

208,037.81

+ interest

else is done

and owing

bought property from Fed.

- \$3,000 for 60 months

\$208,000

40 left

1
family residence located at 2206 Greenwood Avenue, Louisville,
-- Kentucky, value unknown;

d. Real estate in Indiana, value unknown,
concerning which the Foundation has appealed a summary judgment
entered by a trial court in Indiana ~~has entered summary judgment~~
finding that the Foundation has lost title by adverse possession.
~~The Foundation has appealed the summary judgment;~~

e. Real estate in Indiana, value unknown, which
is currently in the Hofgesang Estate and is the subject of
litigation in Indiana state court;

f. A checking account with Great Financial Bank,
Louisville, Kentucky, with a balance of \$818.23 as of May 19, 1995;

g. Numerous undeveloped Twenty lots near the Lee's
Lane Landfill, value unknown;

h. Real estate at 2001 S. 41st Street, ~~Louisville,~~
~~Kentucky,~~ 2003 S. 41st Street, and 2000 S. 40th Street and 1820 S.
40th Street, Louisville, Kentucky which are currently subject to
tax liens which exceed the values of the properties;

i. The Central and Northern Tracts of the Lee's
Lane Landfill;

j. Stock of J H Realty, Inc.

2. J H Realty, Inc. ~~is~~ has as its only asset ~~is~~ the
Southern Tract of the Lee's Lane Landfill.

3. Ben B. Mr. Hardy's has assets and liabilities as
set forth in attachment A.

are they
different?
yes,

4. ~~G.~~ Defendants have made no fraudulent conveyances or transfers in the last seven years *increase to 10 years!*

5. Defendants have made full and complete disclosure of all documents and information relating to each Defendant's assets and liabilities as requested by the United States. *from 1987 to present.*

III. JUDGMENT

~~C.D.~~ Judgment shall be entered jointly and severally in the amount of \$2,277,516.19 against ^{the} Defendants ~~J H Realty, Inc. and The Hofgeessing Foundation, Inc.~~ This judgment shall be set forth in a separate document as required by Rule 58 of the Federal Rules of Civil Procedure.

IV. PAYMENTS BY THE DEFENDANTS

~~D.E.~~ In full and complete settlement, discharge and satisfaction of any claims and demands against the Defendants by the United States for Past Costs and Future Costs, and the judgment against J H Realty, Inc. and the Foundation, the Foundation shall pay to the United States a percentage, as set forth below, of the net liquidated value of the assets of the Foundation listed in II. (B), (1), (a) through (g) of this Consent Decree (the "Settlement Assets"). Said Settlement Assets do not include the properties subject to tax liens in excess of the value of the properties, the Lee's Lane Landfill Northern and Central Tracts, and the stock of J H Realty, Inc. (owner of the Southern Tract of the Lee's Lane Landfill). The Foundation shall pay the United States 90% of the net liquidated value of the Settlement Assets up to \$600,000; 100% 85% of the net liquidated value of the Settlement Assets between

why call them settlement assets?

100%

90%

to verify too vague what is the intent?

Mark Kent's intent to get more?

\$600,000 and \$800,000; and ^{he} 80% of the net liquidated value of the
Settlement Assets over \$800,000. "Net liquidated value" means any
cash amount which is divided between the United States and the
Foundation produced from the liquidation of Settlement Assets and
remaining after deduction of the costs incurred in preserving and
liquidating the Settlement Assets. Immediately upon the
liquidation of any Settlement Asset asset, the net liquidated net
value proceeds shall be deposited into an interest bearing account
with a financial institution selected approved by the United
States, and payments to the United States shall be made in
accordance with instructions provided by the United States to the
Defendants.

let's set
forth what
these costs
are

either do it
this way
or
we won't
agree to
allow
\$ and \$
keep exp
money

~~F. Any money kept by the Foundation shall be used for the
payment of reasonable professional expenses and fees that have been
incurred by the Foundation prior to May 15, 1995. The fees for
professional services are as follows: Brown, Todd & Heyburn,
\$18,000; accountants, ; Indiana law firm, . The Foundation
may pay said fees after it has liquidated the account receivable in
the form of a note as described in II(b)(1)(a) and the real estate
at 3000 Crittenden Drive, Louisville, Kentucky, as described in
II(B)(1)(b). If the Foundation has any remaining funds after
payment of fees for professional services, said funds shall be used
to defray the costs of liquidation or, with the consent of the
United States, to make any necessary charitable contributions to
reduce the tax liability of the Foundation.~~

why agree to pay Mark?!

Came setup special
account?

agreed on time

~~one party account~~

→ we need to setup account that cannot be attached
or how put on?

V. DISCOVERY AND DISCLOSURE OF FINANCIAL ASSETS

~~E.G. Defendants have made full and complete disclosure of all documents and information relating to each Defendant's assets and liabilities as requested by the United States.~~ If at any time the United States Court determines that Defendants J H Realty, Inc. and The Hofgesang Foundation, Inc. have made any material misrepresentation or nondisclosure regarding their financial status and affairs ^{in connection with this Consent Decree} ~~to the United States at the time of lodging of this Consent Decree~~, the satisfaction of judgment provided for herein shall be null and void. If at any time the Court determines that Defendant Ben B. Hardy has made any material misrepresentation or nondisclosure regarding his financial status and affairs to the United States at the time of lodging of this Consent Decree, the covenant not to sue provided for herein shall be null and void.

OK - since it is requested elsewhere

VI. CONTRIBUTION PROTECTION

E.H. With regard to claims for contribution against Defendants for matters addressed in this Consent Decree, the parties agree that, upon entry of this Consent Decree and conditioned upon the subsequent payments by Defendants of the amounts required by this Consent Decree, Defendants are entitled to such protection from contribution actions or claims as is provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), for the matters addressed in this Consent Decree. ~~The matters addressed in this Consent Decree are costs of response in connection with the Lee's Lane Landfill Superfund Site as of the date of entry of this Consent Decree. [Mr.~~

not for Hardy!

yes, Hardy is the one

→ no, because this requires us to go to court and start this process all over.

pay or take judgment

admitted except liability 506-5-1 over 506-5-1 defense

~~Hardy may have to pay something to get this, we will get back to you on this point]~~

VII. COVENANT NOT TO SUE

~~G.I. The United States covenants not to sue Mr. Ben B. Hardy under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9607 to recover Past Response Costs and Future Costs. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs that EPA and the U.S. Department of Justice on behalf of EPA have incurred and paid through the date of the Consent Decree is entered by the Court, plus interest on all such costs. [Ability to pay analysis on Mr. Hardy will be done prior to execution]. If at any time, the United States discovers that Mr. Hardy has concealed assets in existence prior to the execution of this Consent Decree, this covenant not to sue shall be null and void.~~

VIII. LIQUIDATION PROCESS

H.J. Unless and until the United States appoints a receiver or other third party to liquidate the Settlement Assets, The Foundation shall use best efforts to liquidate the Settlement Assets assets of the Foundation according to the attached schedule [to be provided by Defendants]. The Foundation shall be compensated out of Foundation Settlement Assets proceeds for the reasonable and necessary costs and expenses of such liquidation. All liquidation costs and expenses that have been pre-approved in writing shall be reimbursable from the liquidation proceeds. If any such costs and expenses have not been pre-approved, and the

not to exceed \$ —

By the United States

parties dispute the reasonableness or necessity of the costs or expenses, the dispute shall be resolved by the Court.

~~I.K.~~ At any time after entry of this Consent Decree, the United States in its sole discretion may appoint a receiver or other third party to liquidate the Settlement Assets ~~assets of the Foundation~~. The Foundation shall cooperate with the receiver or third party in the liquidation, including but not limited to, providing necessary signatures, information, or documents relating to the Settlement Assets ~~assets~~ or the liquidation thereof. The Foundation shall grant the receiver or third party a general power of attorney to perform the liquidation on behalf of the Foundation during the period of liquidation. The receiver or third party shall not assume any responsibility for managing or operating the Lee's Lane Landfill. If the United States appoints a receiver or other third party to liquidate the Settlement Assets ~~conducts the liquidation~~, the United States will retain ^{100%}~~90%~~ of the net liquidated value of the Settlement Assets ~~assets of the Foundation~~ up to \$600,000; ~~85% 100%~~ of the net liquidated ~~assets~~ value of the Settlement Assets between \$600,000 and \$800,000, and 80% of the net liquidated value of the Settlement Assets ~~assets~~ over \$800,000. Immediately upon the liquidation of any Settlement Asset, the net liquidated value shall be deposited into an interest bearing account with a financial institution approved by Defendants, and payments ~~to Defendants~~ shall be made in accordance with instructions provided by the Defendants to the United States. If a receiver or third party is appointed, the United States ~~conducts~~

NO
we get
Hall
if we do
the liquidation
we'll
win
with
in that
we would
have to

pay costs
plus 10% to
the Fed.

hV.5

*if assets are payed
how are mltg payments being
made?*

~~the liquidation, the United States need not liquidate all assets of~~
~~the Foundation, including the Lee's Lane Landfill, and shall have~~
 a reasonable time to complete the liquidation. During the time of
 the liquidation, the receiver or other third party shall have the
 authority to preserve the ~~assets~~ Settlement Assets of the
 Foundation, including, but not limited to, paying management fees,
 legal fees, mortgage payments, utility bills and taxes.

J.L. Unless and until a the receiver or third party is
 appointed, the Foundation shall not take any action, and shall not
 refuse to take any action, that ~~it believes will~~ adversely affects
 the value of the Foundation's ~~assets~~ Settlement Assets, including
 but not limited to failing to pay taxes, mortgage payments or
 utility bills, encumbering any real estate, or allowing any appeal
 rights to lapse in pending litigation. The Foundation may use
~~Foundation funds and assets~~ the Settlement Assets or proceeds from
Settlement Assets to preserve the ~~assets~~ Settlement Assets of the
 Foundation unless and until a the receiver or third party is
 appointed, including paying management fees, taxes, mortgage
payments, and utility bills for the Settlement Assets and any
 necessary and reasonable attorney's fees to protect any appeal
 rights relating to the ~~Indiana property~~ Settlement Assets which ~~is~~
are or become the subject of litigation; provided, however, that
 such payments must be pre-approved by the United States.

IX. EFFECTIVE DATE

K.M. Defendants are bound by the terms and conditions of this
 Consent Decree upon their signature to this Consent Decree. If for

AC -
 1300
 1300
 1300
 1300

let's
 get a
 number
 on costs
 associated
 with
 preservation

② let's get
 specific line
 table for
 getting
 property on
 the market

any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the parties.

X. MODIFICATION

~~L.N.~~ Except as provided for herein, there shall be no modification of this Consent Decree without prior written approval of the parties to this Consent Decree and the Court.

XI. CONTINUING JURISDICTION OF THE COURT

~~M.O.~~ The Court shall retain jurisdiction to enforce the terms and conditions of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree.

XII. TERMINATION

~~N.P.~~ The terms of this Consent Decree shall remain in effect until the Settlement Assets ~~assets~~ of the Foundation have been liquidated and the appropriate amounts have been distributed paid to the United States...

XIII. DISMISSAL OF CLAIMS

~~O.~~ The United States hereby dismisses without prejudice its claims against the Defendants, except for those claims based on Past Costs or Future Costs, as to which claims the dismissal is with prejudice.

THIS CONSENT DECREE is entered on this _____ day of _____, 1995. IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

★ Fnd: audited last in mid-80's.

1400 did Fnd: generate \$8:
earned 100+ properties

some rentals
some sales
earned 6 businesses when he died

- Salvage Yard
Landscape
Job Shop
Mechanics Shop
- Tire Shop Collection

payments on notes owed from sales real estate

★ Why were they sold in the 1990's?
records?

(gave away \$1.3 million
by requirement of grant grants)

how much was generated?

in 1980's - IRS jumped on them for not giving away
enough \$

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Hardy, et al., Nos. 90-0695-L(J) and 90-072-L(J) relating to the Lee's Lane Landfill Superfund Site in Louisville, Kentucky.

FOR THE UNITED STATES OF AMERICA

DATE

LOIS J. SCHIFFER
Assistant Attorney General
Environment & Natural Resources
Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044

DATE

JAMES R. MACAYEAL, trial attorney
JAMES D.P. FARRELL, trial attorney
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Division
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(502) 582-5911

OF COUNSEL:

ROBERT CAPLAN
Assistant Regional Counsel
Environmental Protection Agency, Region IV

FireSide Bldg. Inc. (formed w/ 2 brothers to develop 6 bldgs including
FireSide Bldg. Inc. ^{SSC} owned it (bought in 1953 by Hardy & dad)
Hardy remodeled 6 bldgs
FireSide Bldg.
Bank was in the
FireSide Bldg.

→ First request of reformation F.S. Bldg. in court
FireSide ^{SSC} wanted to sell

→ F.S. Bldg. became Lincoln, bldg. was sold at auction for \$246,000

→ F.S. Bldg. Inc.: had 30 days to take it over. Malloy took 50% ownership
interest (partnership)

step in late 80's

~~Hardy partnership for~~

209 S. Fifth Associates (50% Malloy
partnership
(took FireSide's rights)
1st refusal - but F.S.
was not compensated
50% - Hardy partnership
1/3 - Emily
1/3 - Ben as trustee
for kids

FireSide Bldg. was developed in 1972. The \$246,000 was paid to buy the bldg.

Hardy started putting his money into F.S. Bldg. Inc. in the 1970's to develop
the buildings. ~~Hardy~~ The bldg. was bought by taking a mortgage.
Malloy bought out Hardy partnership. Gross payout to Hardy \$70,000.

no \$8 from Fnd. went into FireSide Bldg. Inc.?

\$90,000 put up by Hardys for bldg.'s maintenance (mortgage payments, taxes)
what ~~did~~ did you do with payment from Fnd.? Hardy took money
check to bank and cashed it.

FireSide owed Hardy? (for what?) → \$260,000 from his investments over
the years.

Ben put check into FireSide's account?

paid his personal expenses
paid F.S.'s expenses (for rental properties)

FireSide's Bldg. Inc.

income was mainly
rental income.